UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re

VILANO BEACH HOTEL, INC., Case No.: 02-01122-3P1

Debtor.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Case is before the Court upon Vilano Beach Hotel, Inc.'s Objection to Claim Thirty Five (35) filed by Enterprise Landscape, Inc. ("Enterprise"). After hearings held on August 5, 2004 and September 29, 2004, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

1. Vilano Beach Hotel ("Debtor") is the owner and operator of a hotel located in Vilano Beach, Florida.

2. On February 7, 2002, an involuntary petition was filed against Debtor and an order for relief was entered on May 6, 2002.

3. Prior to the petition date, Debtor entered into a contract with Enterprise. On July 16, 2001, Joseph S. Knecht, as president, signed the contract on behalf of Debtor. Michael A. Bryant, as president, signed the contract on behalf of Enterprise on July 18, 2001. The contract states that the scope of the work to be performed was as follows:

> Furnish the following plant material (all Florida specimen grade), install, furnish fertilizer, mulch, final fine grade, ect. Install drainage system on north end of building – six inch pvc. Site grading, two (2) additional irrigation zones. All plants guaranteed, in accordance with plans by Godard Design Associates.

4. The contract stated the price for all the plants was $45,000. Enterprise received a payment of $30,000 on July 18, 2001. (Debtor's Ex. 1)

5. Debtor hired Godard Design Associates to prepare a hardscape and landscape plan for the hotel. Brett Godard, a landscape architect licensed by the State of Florida since 1998, prepared the plant schedule shown on the contract and the hardscape and landscape plan. (Debtor's Ex. 7) (Tr. at 50) Part of Enterprise's obligations under the contract was to implement the landscape plan.

6. Prior to the installation of the plants, Mr. Godard met with Mr. Bryant several times to discuss where the plants would go, the size of the plants and the quality of the plants.

7. On September 5, 2001, Mr. Knecht issued and signed a change order that increased the contract from $45,000 to $45,750. (Debtor's Ex. 6)

8. Under the contract, Enterprise was required to deliver five (5) Canary Palm trees between 10 and 12 feet in height and twenty-seven (27) Mexican Fan Palms between 12 and 20 feet in height. (Debtor's Ex. 1) (Tr. at 144)

9. Mr. Godard testified that he went around the entire property and counted all the installed and uninstalled plants on the property. (Tr. at 77) After conducting his inspection, Mr. Godard prepared a report for Mr. Knecht. The report showed there were numerous plants required to be delivered under the contract which were not at the hotel. (Tr. at 59-63)

10. Mr. Godard also noted in his report that, (1) the Canary Palm Trees were on average approximately 2 ½ feet shorter than what was required under the contract, (2) there were two Needle Palms on site instead of Canary Island Date Palms and (3) the Mexican Fan Palms

were only between 4 to 6 feet of clear trunk instead of 12 to 20 feet of clear trunk as required by the contract. (Tr. at 59-63)

11. On September 18, 2001, Mr. Knecht sent a letter to Enterprise, with an attached copy of Mr. Godard's report. The letter stated that when the work was completed and approved by Mr. Godard, the final balance owed would be $11,600. (Debtor's Ex. 3)

12. In a letter dated September 19, 2001, Mr. Knecht was sent service copies of two claims of lien, which were being recorded by Enterprise on the hotel. (Tr. at 47) (Debtor's Ex. 9)

13. The first claim of lien, in the amount of $51,230, was for landscaping and irrigation labor or materials, $16,230 of the claim is unpaid. The second claim of lien, in the amount of $20,200, is for landscaping labor or materials. (Debtor's Ex. 4)

14. On September 25, 2001, Mr. Knecht sent a letter to Mr. Bryant disputing the two claims of lien. With regard to the claim of lien in the amount of $16,230, Mr. Knecht stated that the claim was exaggerated and contained items for work not performed and for materials not delivered to the property. With respect to the second claim of lien in the amount of $20,200, Mr. Knecht stated he did not know what it was for and that he had not requested or approved any work in the amount of the claim and had no documentation in support of the lien. (Debtor's Ex. 10)

15. Mr. Knecht requested that Mr. Godard perform another site inspection. Mr. Godard's inspection report contained a schedule showing the common plant name, the quantity required under the contract, the quantity on site, and the quantity of missing plants. (Debtor's Ex. 8)

16. Mr. Godard's report also contained a second schedule in which he

calculated the cost of the missing plants and the difference in cost between the taller palms required to be delivered under the contract and the shorter palms which were actually delivered.

17. In Mr. Godard's opinion, the Canary Palms required under the contract cost a total of $3,500 more than the palms actually delivered, and the Mexican Palms required under the contract cost a total of $10,480 more than those palms delivered. (Tr. at 69) (Debtor's Ex. 8)

18. On October 1, 2001, Mr. Knecht received a letter from Holland & Knight, which stated, that the second lien claim in the amount of $20,200 was Enterprise's charge for rough-grading services not included in the original contract with Debtor, but authorized as an extra at the price of $200 per hour. (Debtor's Ex. 12)

19. Mr. Knecht testified that neither he nor any one on behalf of the Debtor, authorized Enterprise to perform any grading or other work in addition to that which was specified in the contract. (Tr. at 29)

20. On October 4, 2001, Debtor entered into a contract with Xellent Landscaping to deliver and install the missing plants required under the Enterprise contract. The total cost of the contract was $7,381.45. (Tr. at 173) (Debtor's Ex. 14)

21. Mr. Bryant testified that the two handwritten schedules, which listed the plants to be delivered, and not the signed contract, actually reflected the agreement between Debtor and Enterprise. (Tr. at 145) (Enterprise Ex's 1, 2)

22. There are no signed written documents by Mr. Knecht which state that the handwritten schedules set forth the parties' agreement or that they supersede the actual contract. Mr. Knecht testified that he considers the contract signed by the parties to reflect the terms of their agreement. (Tr. at 174-175)

23. Mr. Bryant has no written documentation from Mr. Knecht stating that he authorized extra grading work, but testified that Mr. Knecht orally agreed to pay $200 per hour for extra grading work on the day the contract was signed. (Tr. at 111-114,154-157) However, Mr. Knecht testified that he did not authorize Enterprise to do additional work, including site grading, over and above what was set forth in the contract. (Tr. at 177)

24. The "scope of work" under the contract includes "site grading" with no mention of $200 per hour for site grading work in addition to the contract price of $45,000. Additionally, the two handwritten schedules say that the "site grading" is included in the $45,000 purchase price. (Enterprise Ex's. 1 and 2)

25. Mr. Bryant testified that he calculated the second claim of lien in the amount of $20,200 by multiplying the 101 hours he spent on the project by $200 per hour. (Tr. at 127) Mr. Bryant testified that he does not have the original documents that he recorded the time on. Additionally, the Debtor never received a document or invoice from Mr. Bryant setting forth the time Enterprise spent or an hourly rate. (Tr. at 158-159)

26. According to Mr. Bryant's handwritten chart, most of the services were performed in July. The first indication that Mr. Knecht had that Enterprise believed it was owed money for these alleged services is the claim of lien that was filed on September 18, 2001, approximately two months after the majority of the alleged services were provided.

27. On January 4, 2002, Enterprise recorded a partial satisfaction of the first claim of lien in the amount of $2,929 leaving a balance of $13,301. (Debtor's Ex. 4)

28. On October 9, 2002, Enterprise filed its proof of claim in this case in the amount of $43,501. The proof of claim amount exceeds the total of the two claims of lien attached to it by approximately $10,000. (Tr. at 159)

Conclusions of Law

" A proper Proof of Claim is presumed valid, and as prima facia evidence of the validity of both the claim and its amount." In re Marineland Ocean Resorts, Inc., 242 B.R. 748, 757 (Bankr. M.D. Fla. 1999). Unless an interested party objects, a claim is allowed as filed. Once an objection is filed, the objecting party bears the burden of overcoming the presumed validity of the claim with affirmative proof. Id. If the objecting party overcomes the presumed validity of the claim, the claimant must establish the validity and amount of the claim. Id. Thus, the "burden of ultimate persuasion by the preponderance of the evidence rests with the claimant." In re Challa, 186 B.R. 750, 754 (Bankr. M.D. Fla. 1995).

In the instant case, the Court finds the Debtor presented sufficient evidence at the hearing to overcome the presumed validity of the claim. Therefore, the ultimate burden of proving the validity of Claim Thirty Five (35) rests with Enterprise.

Parol Evidence Rule

Mr. Bryant asserts that Mr. Knecht authorized Enterprise to do "site grading" work in addition to that set forth in the contract between the parties. Specifically, he asserts Mr. Knecht orally agreed to pay him $200 per hour for this work. However, Mr. Knecht testified that he did not authorize Enterprise to perform any additional work.

Debtor argues the parol evidence rule bars Mr. Bryant's testimony that Mr. Knecht orally agreed to pay him $200 per hour for additional "site grading" work. Under the parol evidence rule, evidence of prior or contemporaneous oral statements cannot be introduced to vary, contradict or affect the unambiguous language of a valid contract. If a contract is unambiguous, "the best evidence of the parties' intentions is the actual language used in the contract." In re Yates Development, Inc., 241 B.R. 247, 254 (Bankr. M.D. Fla. 1999) *aff'd* Yates Development,

Inc., 256 F. 3d 1285, 1289 (11th Cir. 2001). "Ambiguity exists where the contract language is reasonably susceptible to more than one construction." In re Atkins, 228 B.R. 14, 18 (Bankr. M.D. Fla. 1998).

Debtor asserts that in the instant case the contract is not ambiguous or susceptible to more than one construction. Thus, Debtor argues there is no latent ambiguity. In support of its position Debtor asserts that the contract, (1) is not silent as to the scope of work to be done or the price to be paid for such work, (2) specifically defines the scope of the work which includes "site grading" and (3) sets forth the purchase price at $45,000.

The Court agrees with the arguments set forth by the Debtor and finds Debtor's alleged agreement by pay Enterprise $200 per hour for additional work to be a prior or contemporaneous oral statement or agreement contradicting or affecting the unambiguous language of the written contract between the parties. Therefore, it is barred by the parol evidence rule.

Further, even if it the parol evidence rule was not applicable the preponderance of the evidence shows that Mr. Knecht did not agree on behalf of the Debtor to pay Enterprise $200 per hour for work done in addition to that set forth in the contract. The alleged oral agreement was made on the same date the contract was signed, however there is no written proof of it, not even in the handwritten schedules. Mr. Bryant is a sophisticated businessman and the Court finds it very difficult to believe that he would not reduce such an important agreement to writing. Additionally, Mr. Bryant's handwritten schedules specifically state that the "site grading" is included in the $45,000 purchase price.

Requirements under the Contract

Enterprise asserts it is owed $13,301 under the first claim of lien for services and materials delivered under the contract. Debtor argues it does not owe Enterprise any money

because Enterprise failed to deliver certain plants required under the contract and delivered short palm trees.

In support of its position, Debtor offered evidence at the hearing that the Canary Island Date Palms were on average 2 ½ feet shorter than required and that the Mexican Fan Palms were only 4 to 6 feet of clear trunk instead of the 12 to 20 feet of clear trunk as required under the contract. Mr. Godard testified that in his opinion, the Canary Palms required under the contract cost a total of $3,500 more than the palms delivered and that the cost of the Mexican Palms required under the contract would have cost $10,480 more than those actually delivered, for a total of $13,980. This amount exceeds the $13,301 that Mr. Bryant asserts Enterprise is owed under the contract by $679.00. No other evidence as to the cost difference between the palms delivered and those required under the contract was proffered. Enterprise contends that the Canary and Mexican Palms meet the required height because Mr. Bryant's handwritten schedules show the required height of the palms to be shorter then the heights contained in the written contract.

The Court agrees with the argument set forth by the Debtor. The signed contract, which clearly sets forth the required height of the palms, governs the parties. The Court considers the testimony given by Mr. Godard, as to the price difference between what was required under the contract and what was actually delivered, to be credible and will therefore use his numbers to calculate the difference. Based upon Mr. Godard's figure of there being a $13,980 price discrepancy between the value of the palms delivered versus the value of the palms as required under the contract, Enterprise is not owed any additional money by the Debtor.

Furthermore, based upon Mr. Godard's report dated September 28, 2001 Debtor asserts that Enterprise did not deliver all of the plants required under the contract. Mr. Godard's report,

listed the total cost of these missing plants to be $3,002.50. Mr. Godard testified that on two occasions he went over the entire property to count the plants on site, and that he was sure Enterprise did not deliver all the plants required under the contract.

Subsequent to Mr. Godard's report, Debtor hired Xellent Landscaping ("Xellent") to deliver and install the missing plants. The contract between the parties contained a schedule of plants identical to the number of plants shown as missing on Mr. Godard's report. The total cost to deliver the missing plants and perform other work which Enterprise was required to do but did not do was $6,471.80. Debtor asserts that if the plants weren't missing, Debtor would not have paid Xellent to deliver and install the exact same plants. The Court agrees with Debtor's reasoning in regards to the missing plants. However, even without the issue of the missing plants, the Court has already found that due to the discrepancies between the palms required to be delivered versus' those actually delivered that the Debtor does not owe Enterprise any additional money under the contract.

Conclusion

Based upon the above, the Court will Sustain Debtor's Objection to Claim Thirty Five (35). The Court will enter a separate order in accordance with these Findings of Fact and Conclusions of Law.

DATED this 3 day of January, 2005, in Jacksonville, Florida.

/s/ George L. Proctor
George L. Proctor
United States Bankruptcy Judge

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